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SECRETARY, BOARD OF
OIL, GAS & MINING

In the Matter of the Petition of Genwal
Resources Inc. for Review of Division
Order DO10A; Crandall Canyon Mine,
Carbon County, Utah.

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: REQUEST FOR
: CLARIFICATION OF MINUTE
: ENTRY AND PROPOSED
: PROCEDURES
: TO ADDRESS REMAINING
: ISSUES

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: Docket No. 2010-026

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: Cause No. C015/0032
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The Division of Oil, Gas and Mining through its counsel of record in the above
entitled matter submits this Request for Clarification of the Board's Minute Entry dated
30th September, 2011 and makes the following proposal to address remaining issues.

REQUEST FOR CLARIFICATION

I order to assist the Division in proceeding and preparing for an evidentiary
hearing if deemed necessary, the Division respectfully requests clarification of the
following aspects of the Minute Entry: (1) the legal basis for the minute entry; (2) the
purpose of the evidentiary hearing; and (3) specific questions that would assist in the
preparation.

The Division is willing to brief some or all of these questions if the Board
believes it would be helpful. If the Board does not require further briefing, the Division

asks that the Board issue a written response in time for the Parties to adequately prepare for the hearing including allowing for discovery or continue the hearing if necessary.

I. CLARIFICATION OF LEGAL BASIS FOR THE MINUTE ENTRY.

1. Does the Board find that the Coal Act and rules require as a condition for approval of an application for a permit modification, that the Division require an operator to provide a bond sufficient to cover the costs of water treatment when Division finds that as a result of mining operations polluted water is being discharged from the mine that requires water treatment to meet water quality standards; such that if mining operations were to cease, continuation of water treatment would be required in order for post-mining water discharges to meet water quality standards?

2. If the Board finds that the Division must require bonding to cover a possible need for water treatment costs for post-mining discharges in order to approve a permit modification, may conventional bonding¹ be used for this purpose under any circumstances or conditions without additional rules governing such bonding?

¹ The term “conventional bonding” as used in the Minute Entry is assumed to mean the type of bonding allowed under the current provisions of Utah code §§ 40-10-15 (2) and (3)(2011); i.e. a corporate surety, cash, negotiable bonds of the United States government, negotiable certificates of deposit, and self bonding. SMCRA allows the Secretary to approve as part of the state or federal program “ an alternative system that will achieve the objectives and purposes” of the Act. (30 USC 1259(c)) Utah law would need to be amended and approved by OSM before other types of bonding instruments or systems could be used.

3. Absent additional rules, under what circumstances is it not legal for the Division to require the operator provide a form of conventional bonding for the purpose of meeting such a bonding obligation, and under such circumstances is the Division required to deny the permit modification, to approve it without adequate bonding, or take some other action?

4. The Utah Rulemaking Act Utah Code 63G-3-201 provides that rulemaking is required when an agency action authorizes, requires, or prohibits an action; applies to a class of persons, and is otherwise explicitly or implicitly required by statute. What are the provisions of the Coal Act that require or authorize (expressly or implicitly) the Division to establish rules to govern the use of conventional bonding for long-term water treatment costs? In what way is the reliance on conventional bonding to meet such an obligation a violation of the Act or otherwise illegal absent rulemaking?

II. CLARIFICATION REGARDING THE PROPOSED HEARING ON

DURATION AND COSTS OF TREATMENT

A. Authority to Require Interim Bonding without Rulemaking.

The Minute Entry provides that the Board will take evidence on the probable duration of the discharge and the amount of annual water treatment costs. The entry states that “whether bonding for the water discharge at issue in this matter can be appropriately addressed through the use of conventional bonding mechanisms, including some form of the incremental bonding similar to that addressed in Amended Division Order 10A, depends in part on the probable duration of the discharge.” (Paragraph 3 of Order)

The Division believes this statement needs clarification. The Board apparently has concluded that the Division has authority to require a bond for water treatment costs using the conventional bonds under some circumstances without additional rules. The Minute Entry infers that one result of the hearing may be to require conventional bonding of an incremental type similar to that proposed in the Amended Division Order. The Division welcomes the idea that there would be interim bonding pending rulemaking and believes an incremental bond conditional on the projected duration of the pollutional discharge is one method of providing interim bonding.

However, the Minute Entry also suggests that the legal authority for using conventional bonding is limited to circumstances where the probable duration of the discharge is not very long. This is contrary to the Board's apparent finding that bonding for such water treatment is legally required to approve a permit modification without regard to the potential duration of the discharge. It would be helpful if the Board could clarify the consequences of a finding that the probable duration of the discharge is indefinite and perhaps perpetual.

Prior to an evidentiary hearing on costs and duration of the discharge the Board should clarify that it has authority to require an interim bond using convention bonding. The Board should be explicit about the Division's authority to require interim bonding with conventional bonds pending rulemaking regardless of the duration of the discharge. The Board should also explain if interim bonding is to be conditional and incremental based on the trends of the pollutional discharge or will be based on some other criteria.

If on the other hand, the Board's conclusion is that the Division has no authority to bond for *long-term* pollutional discharges until after rulemaking, the Division concedes

that its testimony will support a finding that this is a potentially long-term pollutional discharge and sees no point in proceeding to a hearing on duration of pollutional discharge or costs of water treatment. The Division has provided its Hydrologic Evaluation as an attachment to the Division Order in which it concluded that the pollutional discharge may continue for a long time. The Division does not intend to modify its report.

B. Alternatives for Covering long-term liabilities with Conventional Bonding.

Prior to an evidentiary hearing the Division would be willing to brief the Board on alternative ways for using conventional bonding to address long-term liabilities. The Board should consider such options rather than basing its decision on the probable duration of the pollutional discharge. Before briefing of these alternatives the Division requires a better understanding of the Board's concerns about the use of conventional bonds for a long-term liability. It is not clear if the Board's concern and perceived need for rulemaking, is based on its desire for greater clarity regarding how to calculate the amount over a longer term; over how to hold a conventional bond for a longer time, over the certainty of the long term projections about the continuity of the discharge, or some other issue.

In any event, it appears that the Board's concerns may not have anything to do with the actual probability of duration, but with a lack of certainty about how to deal with a potentially long-term obligation. If the lack of certainty about how to deal with a potentially long-term bonding obligation is the basis for the Board's perceived legal problem with using conventional bonding for such discharges, then that problem may not require a hearing to determining the probable duration of the pollutional discharge.

Rather, the Board might first require briefing regarding the means of dealing with these uncertainties using the current rules. The briefing could provide means that would allow the Board to enter an interim order pending rule-making based on the existing authority and evidence. The Division believes many perceived long-term problems can be addressed by current provisions in the rules such as the required five-year review of permits, the periodic review of bonding adequacy, and the rules on release of surety.

Assuming the Board finds after briefing that there are existing alternatives, it could, if necessary, proceed to hold the evidentiary hearing on the costs and duration in order to fashion an interim order.

III. OTHER QUESTIONS NEEDING CLARIFICATION.

The Minute Entry raises other questions regarding the Boards expectations as part of a hearing or rulemaking. These additional questions may require briefing by the parties prior to the hearing, and may require an order before proceeding with a hearing.

1. It is the Division's position that the application for a permit modification must demonstrate and the Division must find that the permit as approved will not materially damage the hydrologic balance or violate water quality standards after mining ceases. If so, what is the degree of certainty required to make a finding that there will be no post-mining polluttional discharge without water treatment? Is the standard 'probable' or 'reasonably likely' or some other standard? Who has the burden of proof? Does the Board find that the ability to use conventional bonding without rulemaking is dependent on the degree of certainty regarding the long-term potential for post-mining polluttional discharge?

2. If it is “probable” that bonding will be needed for a short time and “possible” that it is needed for a long time, do the Coal Act and rules require bonding only for the shorter time unless there are rules, or should the bonding be sufficient to cover the larger risk not just the more certain risk unless there is a rule?

3. Is the problem with using conventional bonding without rule for a long-term discharge due to the lack of a definite term and the possible perpetual duration? What shorter period is ok prior to necessitating rule-making? 75 years? 50 years? ten years? three years?

4. Is the problem with using conventional bonding without rulemaking the absence of a clear time frame or basis for release or return of the bond upon cessation of the need for water treatment? Is the Division required to establish a period of sustained cessation of treatment before requiring bonding? How is this different for a short duration of bonding?

5. Is the problem with using conventional bonding without rulemaking due to the amount of the obligation? If so, what is the basis for determining how large of a bond may be required without rule-making? Is federal insurance available? Other factors?

CONCLUSION

The Division welcomes the apparent intention of the Board to require an interim bond during rulemaking. The Division believes it can do so based on the existing statutes and rules regardless of the probable duration of the pollutional discharge. The Board’s Minute Entry needs to be clarified since it is currently unclear regarding the legal authority of the Division and the Board’s concerns about the use of currently authorized

bonding tools for potentially long-term liabilities. After the Minute Entry has been clarified and if still necessary and desired the Division will welcome the opportunity to participate in an evidentiary hearing regarding costs of water treatment and probable duration of the pollutional discharge.

Respectfully submitted this 24 day of October, 2011



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CERTIFICATE OF MAILING

The Undersigned certifies that a true and correct copy of the foregoing Division Request for Clarification was sent to the following persons both electronically and by first class mail this 24th day of October, 2011

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